

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 21 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-SA 2010-0032
)	DEPARTMENT A
Petitioner,)	
)	<u>DECISION ORDER</u>
v.)	
)	
HON. HOWARD FELL, Judge Pro)	
Tempore of the Superior Court of the)	
State of Arizona, in and for the County of)	
Pima,)	
)	
Respondent,)	
)	
and)	
)	
DONALD ANDREW THOMPSON,)	
)	
Real Party in Interest.)	

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20030430

JURISDICTION ACCEPTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines and Amy S. Ruskin

Tucson
Attorneys for Petitioner

¶1 In this special action, petitioner State of Arizona challenges the respondent judge's order granting, in part, real party in interest Donald Andrew Thompson's motion to set aside his 2003 conviction of drive-by shooting and application to restore civil rights. The only portion of that order the state challenges is the dismissal of the conviction. The state has no equally plain, speedy, or adequate remedy by appeal. *See* Ariz. R. P. Spec. Actions 1(a); *see also* A.R.S. § 13-4032 (setting forth orders in criminal cases from which state may appeal). For this reason, and because the respondent judge abused his discretion by committing an error of law, we accept jurisdiction and grant relief. *See* Ariz. R. P. Spec. Actions 3(c) (special action relief appropriate when respondent judge abuses discretion); *Arizona City Sanitary Dist. v. Olson*, ___ Ariz. ___, ¶ 14, 230 P.3d 713, 718 (App. 2010) (error of law constitutes abuse of discretion).

¶2 Thompson was convicted pursuant to a plea agreement of drive-by shooting, in violation of A.R.S. § 13-1209. He filed a motion and application pursuant to A.R.S. § 13-907. The state opposed the motion/application, but the respondent judge granted it, restoring Thompson's civil rights, except for the right to carry a gun or firearm, and dismissing the conviction.

¶3 The state challenges the respondent's order in this special action proceeding. Thompson has not filed a response to the petition, which we may, in our discretion, regard as a confession of error as to any debatable issue. *See State ex rel. Dep't of Econ. Sec. v. Munoz*, 223 Ariz. 434, ¶ 5, 224 P.3d 250, 251-52 (App. 2010).

¶4 A person is not entitled to have a judgment of guilt set aside pursuant to § 13-907 if the person has been convicted of an offense "[i]nvolving the use or exhibition

of a deadly weapon or dangerous instrument.” § 13-907(D)(2). Consistent with the language in § 13-1209, Thompson was charged in count one of the indictment with having “committed a drive by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure” Thompson pled guilty to drive-by shooting as alleged in count one. The offense involved the use or exhibition of a deadly weapon and, by its express terms, § 13-907 “does not apply” to Thompson. *See* § 13-907(D)(2).

¶5 Granting special action relief, we reverse the portion of the respondent’s order of April 30, 2010, dismissing the judgment of conviction entered against Thompson for drive-by shooting.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

Presiding Judge Espinosa and Judge Kelly concurring.